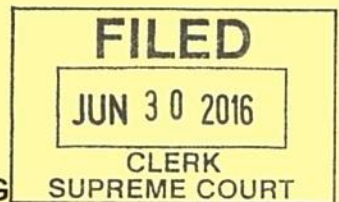


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NOS. ~~2015-SC-178-DG and~~ 2015-SC-181-DG



LORI HUDSON FLANERY (in her official capacity as Secretary of the Finance and Administration Cabinet, Commonwealth of Kentucky);

THOMAS B. MILLER (in his official capacity as Commissioner of the Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky);
and

KENTUCKY CATV ASSOCIATION, INC.
vs.

APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 2013-CA-001112
FRANKLIN CIRCUIT COURT NO. 11-CI-01418

CITY OF FLORENCE, KENTUCKY; CITY OF WINCHESTER, KENTUCKY;
CITY OF GREENSBURG, KENTUCKY; CITY OF MAYFIELD, KENTUCKY;
KENTUCKY LEAGUE OF CITIES, INC.

APPELLEES

THE FINANCE AND ADMINISTRATION CABINET'S REPLY BRIEF

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Barbara B. Edelman, David J. Treacy, Haley Trogden McCauley, Dinsmore and Sholh LLP, 250 W. Main St., Suite. 1400, Lexington, KY 40507; Timothy J. Eifler, Douglas F. Brent, and Jackson W. White, Stoll Keenon Ogden PLLC, 500 W. Jefferson St., Suite 2000, Louisville, KY 40202; Eric S. Tresh, Maria M. Todorova, Sutherland Asbill & Brennan, 999 Peachtree Street NE, Suite 2300, Atlanta, GA 30309-3996; John Nalbandian, Taft Stettinius & Hollister LLP, 425 Walnut St., Ste. 1800, Cincinnati, OH 45202-3957; and Gardner F. Gillespie, J. Aaron George, Sheppard Mullin Richter & Hamilton LLP, 2099 Pennsylvania Ave. N.W., Ste. 100, Washington D.C. 20006-6901; Phillip Shepherd, Chief Circuit Judge, Div. I, Franklin Co. Courthouse, 222 St. Clair St., Frankfort, KY 40601; and Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 by first class mail this the 24th day of June, 2016.

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"The Legislature may pass any act not forbidden expressly or by necessary implication by the Constitution." (Appellants' Br. 16 (quoting Batesville Casket Co. v. Fields, 288 Ky. 104, 155 S.W.2d 743, 745 (1941))). Preliminary to discussing the grounds upon which the Appellees assail the Telecommunications Tax as contrary to the rights and privileges guaranteed, we emphasize that

the legislative department of the government has supreme authority within the sphere of its powers, and its acts are immune from interference or disturbance from the judiciary, unless it transcends its powers by undertaking by legislation in some way to override the safe guards created by the provisions of the Constitution. The fact that a statute is drastic or impolitic or in the opinion of many not conducive to the best interests of the public, or deprives citizens of privileges which many think they ought to have, does not empower or authorize a court to set it aside or to render it inoperative, if the Legislature has not transcended its authority in enacting it. . . . The expediency of a statute, or whether or not the public weal demands its enactment, are political questions, which address themselves to the legislative department of the government, and with such phases of those questions the judiciary has nothing to do.

Lakes v. Goodloe, 195 Ky. 240, 242 S.W. 632, 635 (1922); see also Dalton v. State Property Buildings and Commission, 304 S.W.2d 342, 345 (Ky.1957)("[O]ne of the most firmly established principles of constitutional law, and an oft-repeated mandate of the courts, is that the wisdom or expediency of enactments of the Legislature is not for the courts to pass upon.").

Thus, although the Appellees' frustration that their monthly distributions are 17% less than their historical collections from franchise fees is understandable (Appellees' Br. 7-8), the expediency of the Legislature's decision to place a statutory cap on distributions is not in issue. The question to be considered is whether Ky. Const. §§163 and 164 restrict the power of the people, through their representatives in the Legislature, by conferring upon the Appellees

complete control over the levying and collection of franchise fees. Likewise, the Appellees' concern over the wisdom of the amount of revenue collected from the Telecommunications Tax that is apportioned to the General Fund (Appellees' Br. 8), presents a political question, which is properly reserved for the legislature. see e.g. Dalton, 304 S.W.2d at 345 (refraining from passing upon the expediency of enactments of the Legislature "ha[s] special pertinency in matters of fiscal policy and authority to levy taxes and to appropriate the revenue.")

I. Ky. Const. §164 neither expressly nor impliedly gives cities the right to collect franchise fees.

The Appellees agree that "cities do not enjoy sole authority over all franchise matters." (Appellees' Br. 20) They also agree that Ky. Const. §163 vests a city with only the right to control the original occupation of its public ways and streets, (Appellees' Br. 13). However, their assertion that §164 confers upon cities a right to collect franchise fees (Appellees' Br. 12-16), is neither supported by the express language, nor judicial interpretation.

As we explained, Ky. Const. §164 "does not expand any authority conferred by §163." (Cabinet's Br. 18)(quoting City of Florence v. Owen Electric Cooperative, Inc., 832 S.W.2d 876, 881 (Ky. 1992)). Rather, the purpose of §164 is to set forth the manner in which the consent to occupy streets and public ways must be granted so as to prevent the cities themselves from giving away or granting franchises for inadequate prices, and to protect citizens against exorbitant prices by requiring a competitive bidding in order to discourage monopolies. (Cabinet's Br. 18-19)(citing Stites v Norton, 125 Ky. 672, 101 S.W. 1189, 1190 (1907); Hilliard v. George G. Fetter Lighting & Heating Co., 127 Ky.

95, 105 S.W. 115, 118 (1907)). These cases and others cited by the Appellees in support of the contention that §164 gives the right to cities to collect the franchise fees misconstrues that the protection afforded by §164, as pronounced by the courts, is to the citizens, not to the cities.

In other words, “[t]he power to grant franchises as an original proposition inheres in the sovereignty of the state[.]” (Kentucky Utilities Co. v. Bd. of Com’rs of City of Paris, 254 Ky. 527, 71 S.W.2d 1024, 1026 (1934)). “It is a misconception to characterize Sections 163 and 164 as eliminating total legislative authority regarding franchising.” City of Florence, 832 S.W.2d at 879. “A franchise is not purely local in character.” Id. “In this State, ‘all power is inherent in the people’ (Section 4, Constitution), and they, through their representatives in the Legislature, have all power except as prescribed and prohibited by that instrument.” Bd. of Education of Louisville v. Sea, 167 Ky. 772, 181 S.W. 670, 673 (1916). Here, the Legislature, representing the people, has exercised its power to control the revenue-raising aspect of franchise fees, while leaving to the cities the negotiation of numerous fees relating to the service and terms of service to be provided by the franchisee. The cities continue to receive remuneration for the franchise via monthly distributions from the Telecommunications Tax regime, as well as from these other negotiated fees, as envisioned by Ky. Const. §§163 and 164.

Further, it is clear these exceptions to the general prohibition “from levying any franchise fee or tax” were contemplated by the Legislature so that the cities could award franchises to the “highest and best bidder.” The Appellees’

contention that the statutory prohibition placed on cities to refrain from levying any franchise fee or tax "skews the 'highest and best bidder' requirement for granting a franchise" (Appellees' Br. 16), overlooks that "the primary purpose of granting the franchise is not to obtain revenue, but to give the city reasonable control over the service and terms of service." (Cabinet's Br. 21)(quoting Town of Hodgenville v Gainsboro Telephone Co., 237 Ky. 419, 35 S.W.2d 888, 889-890 (1931)). These important elements continue to be in the hands of cities to negotiate. Moreover, the cities are not constrained to choose the highest bid; rather, the "highest and best" bid satisfies the dictates of Ky. Const. §164 "if the decision is based on the exercise of sound discretion untainted by arbitrariness or corruption." Id. (quoting Communications Systems, Inc. v. City of Danville, Ky., 880 F.2d 887, 892 (6th Cir. 1989)). When drafting the Telecommunications Tax, the Legislature carefully considered the manner in which cities are required to grant their franchises by excluding from the prohibition of fees those elements necessary for cities to award their franchises to the "highest and best bidder."

II. The Telecommunications Act is reasonably within the scope of a legitimate public purpose.

Finally, our reply to the Appellees' accusation that we have not "squarely addressed" their suggestion that if the Telecommunications Tax is held to be valid, "nothing will prevent the General Assembly from . . . continually reducing future amounts distributed to cities . . . or even eliminating those distributions entirely" (Appellees' Br. 17-18), is that we have done so, albeit perhaps indirectly.

Once it is determined that Ky. Const. §§163 and 164 neither expressly, nor impliedly confer upon the Appellees an absolute right to levy and collect franchise fees, “ [t]he question is not what influenced the legislation, but whether the emergent law is reasonably within the scope of a legitimate public purpose.” (Cabinet’s Br. 13)(quoting Moore v. Ward, 377 S.W.2d 881, 888 (Ky. 1964). As we explained in more detail in our brief on page 25, a determination as to whether the consideration for a franchise is sufficient is measured according to its tendency to injure the public or is against the public good. The Telecommunications Tax gives cities control over the service and terms of service so that they may award franchises to the highest and best bidder; Ky. Rev. Stat. 136.660(3) makes clear that cities are free to negotiate and exercise control over these elements that are of chief importance. Meanwhile, the General Assembly’s purposes to provide a fair, efficient and uniform method for taxing telecommunication services and to overcome the limitations placed upon the taxation of these services by the federal law, among others, as set forth in Ky. Rev. Stat. §136.600, are being fulfilled by the Telecommunications Tax regime.

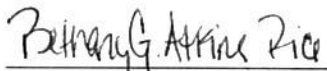
At any rate, our interpretation of the “savings clause” found in Ky. Rev. Stat. §136.660(4) and (5) contemplates that a city may choose to require payment of franchise fees by forfeiting its share of the proceeds of the Telecommunications Tax. See e.g., Jefferson Co. Bd. of Educ. v. Fell, 391 S.W.3d 713, 718 (Ky. 2012)(“We presume the General Assembly intended for the statute to be construed as a whole, for all its parts to have meaning, and for it

to harmonize with related statutes." (citation omitted)). Thus, the Appellees may opt out of the tax altogether if they perceive their distribution amounts are inadequate.

CONCLUSION

For these reasons, and those found in our brief, the decision of the Court of Appeals should be reversed and the opinion of the Franklin Circuit Court affirmed and reinstated.

Respectfully submitted,


Bethany G. Atkins Rice